No. 83-1584 and No. 83-1576



IN THE

# Supreme Court Of The United States

OCTOBER TERM, 1983

GERALD W. BRUNNER, *et al.*,
*Petitioners,*

—v.—

NATIONAL STEEL CORPORATION, *et al.*,
*Respondents.*

EUGENE R. SUTTON, *et al.*,
*Petitioners,*

—v.—

WEIRTON STEEL DIVISION OF
NATIONAL STEEL CORPORATION, *et al.*,
*Respondents.*

**ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

## BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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## COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the court below erred in holding that an employer may, in the context of arms-length negotiations with representatives of its union and nonunion employees for the employee purchase of certain facilities operated by the employer, seek, as a pre-condition for the sale, amendments to collectively bargained and voluntary benefit plans of which it is an administrator and which are subject to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (1982) ("ERISA"), which clarify that the sale would not constitute an event triggering employee entitlement to certain contingent nonvested benefits?

2. Whether the court below erred in holding that a sale of corporate assets, the terms of which required modification of certain employee pension and severance benefit plans, did not involve a prohibited transaction in violation of section 406 of ERISA, 29 U.S.C. § 1106 (1982), when no funds, property or like assets of the plans were utilized to further the acquisition and the plans were not parties to the sale?

3. Whether the court below erred in holding that the district court did not abuse its discretion in granting summary judgment in favor of respondent Independent Steelworkers Union on issues previously reserved in a motion to dismiss, when petitioners were fully aware of, and briefed, those issues after having earlier presented live testimony from their own witnesses together with other evidence and had cross-examined at length respondents' witnesses including the president of the union at a full evidentiary hearing regarding those issues?

## PARTIES TO THE PROCEEDINGS

The petitoners seek review of three actions which were consolidated below: *Brunner, et al., v. National Steel Corporation, et al.; Sutton, et al. v. Weirton Steel Division of National*

*Steel Corporation, et al.* and *Dhayer, et al. v. Weirton Steel Division of National Steel Corporation, et al.*

Respondent Weirton Joint Study Committee, Inc. was a party to the *Brunner* action. It is a not-for-profit corporation existing under the laws of the State of West Virginia having no subsidiaries or other corporate affiliations.

Respondent National Steel Corporation was a defendant in the *Brunner, Sutton* and *Dhayer* actions.[1] National will be submitting a separate brief in opposition to the petitions herein which will list its subsidiaries and corporate affiliations.

Respondent Independent Steelworkers Union was a named defendant in all three actions. It is an incorporated labor organization existing under the laws of the State of West Virginia having no subsidiaries or other corporate affiliations. It is the recognized collective bargaining representative for each petitioner in the *Brunner* action and the majority of petitioners in the *Sutton* action.

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[1] The named defendant in the *Sutton* and *Dhayer* actions was "The Weirton Steel Division of National Steel Corporation." Since the culmination of the transactions which gave rise to these actions, the Weirton Steel Division, which never had a separate legal identity from National Steel Corporation, for practical purposes no longer exists. Its assets were sold to Weirton Steel Corporation, an independent employee-owned corporation existing under the laws of the State of Delaware. Weirton Steel Corporation has no subsidiaries or other corporate affiliations. It was not a party to the proceedings below, and is not a respondent herein.

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**ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

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## BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

Respondents Weirton Joint Study Committee, Inc. (the "Committee"), and Independent Steelworkers Union ("ISU") (collectively referred to, along with National Steel Corporation,

as "Respondents"), submit this brief in opposition to the Petitions for Writs of Certiorari filed by the appellants in the actions entitled *Brunner, et al. v. National Steel Corporation, et al.* in No. 83-1584 ("*Brunner* Petition") and *Sutton, et al. v. Weirton Steel Division of National Steel Corporation, et al.* and *Dhayer, et al. v. Weirton Steel Division of National Steel Corporation, et al.* in No. 83-1576 ("*Sutton* Petition").[2] This Brief will respond to both petitions which seek review of the same decision below.

## STATEMENT OF THE CASE

These actions arise out of the decision by National Steel Corporation ("National") to downsize the operations at its Weirton Steel Division (the "Division") and the efforts of the ISU and representatives of the Division's nonunion employees to preserve the jobs of thousands of Division employees. Those efforts, following prolonged and intensive arms-length negotiations between National and representatives of the Division's employees, culminated in a complex series of transactions by which National sold substantially all of the assets of the Division as an ongoing business to the newly formed, employee-owned Weirton Steel Corporation ("Weirton Steel").

Petitioners have sought to thwart these efforts, and the collective bargaining and negotiating process, in an attempt to secure for themselves certain "shutdown" benefits despite the fact that, after the sale, they continued to possess the same benefits they held as Division employees, they were not deprived of a moment's employment and they obtained an ownership interest in the new company. To this end, petitioners urged the courts below to adopt a strained interpretation of sections 404 and 406 of ERISA which is contrary to the clear language and intent of ERISA and prior decisions of this Court.

Petitioners further urged the district court to substitute its judgment for that of the ISU by finding that the ISU had

[2] The appellants in the *Brunner*, *Sutton* and *Dhayer* actions are collectively referred to herein as "petitioners."

breached its duty of fair representation by reviewing, accepting and endorsing the recommendations of the Committee which had retained independent, outside expert consultants to explore the feasibility of an employee-owned corporation and later to formulate a proposal for the sale of the Division's assets to Weirton Steel. When the district court declined to exceed the traditional bounds of judicial involvement in the collective bargaining process, and was unable to find any factual support for petitioners' unfair representation claims, petitioners urged the Court of Appeals to reverse the district court on the grounds of alleged procedural irregularity, despite the fact that petitioners were unable to demonstrate any error in the district court's determination, or prejudice resulting from the procedure employed.

The Court of Appeals affirmed the district court's judgment in favor of respondents, refusing to depart from precedent established by this Court and consistently followed by the Courts of Appeals, or to adopt the unrealistic interpretation of ERISA urged by petitioners. Furthermore, the Court of Appeals refused to reverse the district court's grant of summary judgment in favor of the ISU, finding that any technical error that may have occurred was harmless given the procedural history of this action.

Petitioners now seek to have this Court review that decision. But as demonstrated below, the issues involved do not warrant review by this Court, and the Petitions for Writs of Certiorari should be denied.

## STATEMENT OF FACTS

Despite having presented, at a full evidentiary hearing, live testimony from their own witnesses and having cross-examined respondents' witnesses at length regarding the issues raised in their complaints, petitioners were unable to demonstrate the existence of a question of fact with respect to any of their allegations. In their petitions to this Court, petitioners choose simply to ignore the facts which both courts below found to be

conclusively established by uncontroverted evidence and to reassert their naked allegations. Contrary to those allegations, the *facts* that were conclusively established below follow:

**A. Background**

The Division was one of the largest integrated steelmaking facilities in the United States. After years of continuing decline from a peak employment of 16,000 workers, the Division employed, at the time of sale, in excess of 7,000 workers and was the largest single-site employer in the State of West Virginia. *Brunner* Appendix at A2.[3]

In early 1982, National announced that it had embarked on a program of "downsizing" its steelmaking facilities to the extent necessary to meet market demand and earn a return for its stockholders. Consistent with that policy, and with continued weak demand for orders, National took steps to trim operations at the Division and its other steelmaking facilities. Had the acquisition of the Division's assets not been consummated, the Division would have eventually been further "downsized" to a mere finishing operation for steel produced elsewhere and may ultimately have closed altogether. *Brunner* Appendix at A2; A38.

More than 2,000 Division employees were on layoff at the time Weirton Steel acquired the Division's assets. These layoffs had resulted in substantial suffering and hardship on the part of the unemployed workers and their families, as well as the local merchants, suppliers, vendors, governmental entities and charitable and social organizations in the surrounding communities in West Virginia, Ohio and Pennsylvania, which are dependent on the employees' income, or which provide for their welfare. These hardships, however, pale when compared with those that would have eventually resulted from the continued downsizing of the Division. *Brunner* Appendix at A6.

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[3] The opinions of the courts below in the *Brunner, Sutton* and *Dhayer* actions are provided to the Court in the appendices to the *Brunner* and *Sutton* petitions. Because the opinions are essentially identical, respondents will refer the Court only to the *Brunner* decision unless the context requires reference to the other opinions.

**B. The Efforts To Save The Division**

In an effort to avoid these hardships, and stave off the personal and economic disaster that would occur as a result of a shutdown of the Division, representatives from the Division's two unions and the Division's nonunion employees formed the Committee to explore the feasibility of an employee purchase of the Division's assets as an ongoing independent employee-owned Weirton Steel. The Committee consisted of twenty-one representatives of the ISU, three representatives of the Independent Guard Union ("IGU") and five members of the Division's management. *Brunner* Appendix at A2-A3; A38.

National took no part in the formation or financing of the Committee, nor did it in any manner dominate or control the Committee to further National's self-interests. Contrary to petitioners' assertion, no genuine issue of material fact exists on this point. *Brunner* Appendix at A3, A13. Furthermore, the findings below were independently endorsed by the Office of the General Counsel for the National Labor Relations Board which found no basis for issuing a complaint against National or the ISU on the grounds of alleged employer domination arising from the presence of the Division's management personnel on the Committee. *See* Appendix to Brief of National Steel Corporation in Opposition to Petitions for Writs of Certiorari.

Petitioners are also wrong in asserting that the nonunion employees, including the *Dhayer* petitioners, were not represented during the negotiations between National and the Committee regarding the sale of the Division's assets. The entire purpose of the management members on the Committee was to afford nonunion employees a voice in the deliberations to which they were not legally entitled and would not otherwise have had. And, although the Committee members were not "representatives" in the collective bargaining sense, there is no evidence in the record below that their interests were antithetical to those of the other nonunion employees of the Division, or that they did not in fact seek to represent adequately the interests of nonunion workers.

Pursuant to its mandate, the Committee retained a nationally prominent business consulting firm to conduct a feasibility study of an employee-owned enterprise. *Brunner* Appendix at A3, A4, A13; A38, A44. The resulting study concluded that an independent Weirton Steel could be a viable business entity if certain labor costs were reduced and efficiencies achieved. *Brunner* Appendix at A3.

Thereafter, the Committee, through its outside counsel and financial advisors, entered into negotiations with National for the purchase of the Division's assets by Weirton Steel. The unions then began negotiating the amendments to the existing collective bargaining agreements with National and representatives of Weirton Steel necessary to effect the creation of an independent employee-owned company.

**C. The Terms Of The Acquisition**

The result of these negotiations was a series of transactions whereby Weirton Steel acquired the Division's assets as an ongoing business, and all of the outstanding shares of Weirton Steel stock were acquired by an employee stock ownership plan ("ESOP"). Through the ESOP, Weirton Steel employees obtained the entire equity ownership interest in the company and a voice in its management. *Brunner* Appendix at A3.

At issue in these actions is a relatively discrete portion of the transaction involving certain amendments to the existing "70/80" and "Rule-of-65" pension benefits and the severance benefits conferred on union employees by the collective bargaining agreements with National and on nonunion employees under a voluntary benefit program maintained by National.[4]

Insofar as relevant to this appeal, "70/80" retirement benefits were available to qualifying individuals, both union and nonunion, only if their "continuous service [was] broken

[4] The term "pension and severance plan" used in this brief refers to all benefit agreements applicable to union and nonunion employees relevant to the petitions.

by reason of a permanent shutdown of a plant, department or subdivision thereof...." Similarly, under the collective bargaining agreements, qualifying union-represented employees were entitled to a severance allowance when they became unemployed as a result of a permanent "shutdown" of a department or substantial portion thereof. Under National's severance policy for nonunion employees, a severance allowance was payable in the event such employees lost their jobs by reason of a permanent reduction in the work force or an elimination of the job they occupy. "Rule-of-65" retirement benefits were available to qualifying employees, both union and nonunion, whose continuous service was broken by reason of "layoff" and who had "not been offered suitable long-term employment." *Brunner* Appendix at A7, A14-A17.

Under the agreements between National, the ISU and the IGU,[5] the pension and severance plans were amended to clarify that the sale of the Division's assets as an ongoing business to Weirton Steel would not constitute a "shutdown", "layoff" or "lack of suitable long-term employment." National was to make comparable changes to the plans covering nonunion employees. In other words, the creation of an employee-owned corporation by the sale of the Division's assets to Weirton Steel was not to constitute an event automatically entitling employees to "70/80", "Rule-of-65" or severance benefits. *Brunner* Appendix at A7, A18. These amendments were sought by

[5] When these actions were commenced, the subject of petitioners' challenge was an Agreement in Principle, dated March 11, 1983, between National and the Committee on behalf of Weirton Steel. This Agreement was superceded by the "Assets Purchase Agreement" dated as of April 29, 1983 and its related Closing Agreements (collectively referred to as the "Purchase Agreement"), all between National and Weirton Steel. Although the terms of the Purchase Agreement and the Agreement in Principle differ in several respects, those differences are neither relevant nor material to the issues raised in the petitions before this Court. The new collective bargaining agreements between the unions and Weirton Steel, and the amendments to the existing collective bargaining agreements between the unions and National were ratified overwhelmingly by the ISU and IGU memberships on September 23, 1983 and the transaction closed on January 11, 1984.

National as partial consideration for the sale without which National believed the sale would not be in its financial interest.

The pension agreements were also amended to provide for the continuation of pension coverage by National for former Division employees following the sale. Thus, all assets of National's pension plan that are attributable to any past Division employee or employee of Weirton Steel were required to be segregated in a separate trust fund or insurance contract to be available for the exclusive purpose of satisfying vested pension rights of such employees. At the same time, National remains liable for all accrued benefits earned prior to May 1, 1983, a date agreed upon in the Agreement in Principle. In addition, National will remain liable for payment of "70/80" and "Rule of 65" benefits should Weirton Steel cease operations on or before November 1, 1988. *Brunner* Appendix at A17-A18. This five year "safety-net" of shutdown responsibility of National, a former employer, for a future shutdown over which it has no control, provides extraordinary protection to Weirton Steel employees, and was a major concession extracted from National by the ISU and other representatives of the Division's workers.

Notwithstanding petitioners' allegations to the contrary, no Division employee has been denied, as a result of the sale, any benefit to which he had a legitimate expectation. As a threshold matter, the benefits which were amended were "shutdown" benefits. No shutdown of the Division occurred; the entire thrust of the negotiations between National and the Division's employees was to avoid a shutdown. Not a single Division employee missed even a moment's employment as a result of the sale of the Division's assets to Weirton Steel. Indeed, following the sale, Division employees not only continued to have their jobs, they also owned an equity interest in the company which they had not previously enjoyed and which affords them an opportunity to share doubly in the future success of Weirton Steel as both employees and shareholders. *Brunner* Appendix at A22.

Equally important is the fact that between the continued coverage provided under National's benefit plans and the new coverage of the Weirton Steel Corporation Retirement Plan, Weirton Steel employees are currently provided with shutdown benefits identical to, and in some respects better than, those that were available to them as Division employees. National continues to be responsible for shutdown benefits should Weirton Steel be permanently shutdown on or before November 1, 1988. In the event of a partial shutdown or a permanent shutdown occurring after November 1, 1988, identical shutdown benefits are available under Weirton Steel's benefit plans. Even after November 1, 1988, should Weirton Steel lack resources sufficient to provide all available benefits under its plans, National continues to be liable for all pension benefits, other than those contingent on a shutdown, earned prior to May 1, 1983. In addition, National has agreed to recognize service with the new company in determining pension eligibility after the sale, thus enabling all Weirton Steel employees formerly employed by National to qualify sooner for retirement under National's plan by adding their years of service with Weirton Steel to those already accumulated under National. ***Brunner*** Appendix at A17-A18; A39.

In short, as a result of the sale, the employees of the Division have their jobs, an equity interest in an employee-owned corporation and benefits equivalent to those enjoyed as Division employees.

**D. Prior Proceedings**

1. ***Procedural History***

Petitioners suggest that the courts below summarily dismissed their claims without affording petitioners either notice or an opportunity to develop at least some issue of fact which would have precluded summary judgment. Such is simply not the case.

Shortly after filing their complaints, petitioners in the ***Brunner*** and ***Sutton*** actions moved for temporary restraining orders, and later for preliminary injunctions, enjoining the sale

of the Division's assets under the terms of the Agreement in Principle. The district court conducted consolidated evidentiary hearings on these motions. At these hearings, counsel for all petitioners submitted evidence in the form of affidavits, live testimony from witnesses, and exhibits. Petitioners' counsel also conducted lengthy and detailed cross-examination of respondents' witnesses, including Walter Bish, the president of the ISU, and Carl Valdiserri, Executive Vice President of the Division and one of the principal negotiators on behalf of the Division's nonunion employees. The cross-examination spanned every issue presented in the motions considered below and raised in the petitions to this Court. After receiving this evidence and hearing argument, the district court denied the motions. *Sutton* Appendix at 13a-16a.

On May 24, 1983, National moved for summary judgment in the *Brunner, Sutton* and *Dhayer* actions. At the same time, the ISU filed a motion to dismiss the *Sutton, Brunner* and *Dhayer* claims as to it. The ISU's motion to dismiss the *Brunner* action was joined by the Committee. All issues raised in both the motions to dismiss and National's motion for summary judgment were fully briefed by the *Brunner* petitioners. The *Sutton* and *Dhayer* petitioners chose to ignore the motion to dismiss and did not file briefs, but did respond to the summary judgment motion.

In orders dated June 1, 1983 and June 2, 1983, respectively, the district court granted, in part, the motions to dismiss as to the *ultra vires* claims against the Committee in *Brunner,* and most of the breach of duty claims against the ISU in *Sutton.* Determination of the unfair representation claims in both *Sutton* and *Brunner* was deferred pending consideration of National's motion for summary judgment. *Sutton* Appendix at 91a-97a.

Prior to that consideration, the district court directed the parties to submit a statement of issues to be resolved in that motion. On April 29, 1983, National filed its statement which included the question of whether the transaction involved a breach by the ISU of its duty of fair representation. Thereafter,

on May 26, 1983, after receiving National's motion papers which fully briefed that issue, petitioners filed their statement of issues to be resolved which also included their unfair representation claims. *Brunner* Appendix at A6-A9; A45.

2. ***The Decisions Below***

In a Memorandum Opinion and Order entered July 8, 1983 (the "July 8 Order"), the district court granted partial summary judgment in favor of National and its Retirement Program in the *Sutton* and *Brunner* actions. The court also resolved in favor of National, the Committee and the ISU the issues deferred in the motions to dismiss filed by the Committee and the ISU. *Brunner* Appendix at A1-A35, *Sutton* Appendix at 17a-50a. In a companion order, entered September 12, 1983, the court granted partial summary judgment in favor of National and its Retirement Program in *Dhayer* and dismissed all claims against the ISU in that action. *Sutton* Appendix at 53a-83a.

The district court held that the sale of the Division's assets to Weirton Steel, and in particular the amendments to the pension and severance benefit plans, did not violate sections 404 or 406 of ERISA. 29 U.S.C. §§ 1104, 1106 (1982). The court found that the fiduciary duties owed plan beneficiaries under section 404 did not prohibit the modification or deletion of contingent, nonvested benefits. *Brunner* Appendix at A18-A20. The court also held that the fiduciary duties imposed under ERISA did not preclude an employer from exercising its rights to negotiate or determine the terms and conditions of future pension benefits simply because it happens also to be a plan administrator. *Brunner* Appendix at A26-A30. Similarly, the court held that section 406 of ERISA was not applicable to a sale of corporate assets which neither requires the plan to participate in any transaction, nor involves the use of the monies, properties or other like assets of the plan. *Brunner* Appendix at A23-A26.

With respect to petitioners' claims that the ISU breached its duty of fair representation by "acquiescing in the withdrawal

of member's negotiated pension and severance rights," the court reaffirmed the principle, long established by this Court, that in the context of a threat to its members' jobs, a union is possessed of great leeway "to pursue unique procedures and mechanisms to avoid loss of employment for [its] members," which includes the right to negotiate amendments to existing collective bargaining agreements, provided that the union acts in good faith and in a nondiscriminatory manner. *Brunner* Appendix at A10-A12.

With this principle in mind, the court found that the undisputed facts conclusively established: (a) that the proposed amendments to the collective bargaining agreements applied uniformly to all ISU members, and, hence, were nondiscriminatory; (b) that the framework for the sale of the Division's assets, including the proposed amendments to the pension and severance plans, was negotiated principally by independent, outside consultants having national and international reputations in their areas of expertise, whose recommendations were considered and relied upon by the ISU; and (c) that petitioners had made no specific allegation and raised no question of fact supporting their argument that the amendments were arbitrary. Under these circumstances, the court concluded that the ISU had not breached its duty of fair representation. *Brunner* Appendix at A12-A13.

Final judgments pursuant to Rule 54(b) of the Federal Rules of Civil Procedure were entered in *Sutton* and *Brunner* on September 15, 1983, and in *Dhayer* on September 21, 1983. *Sutton* Appendix at 86a-90a. Plaintiffs in all three actions appealed, and those appeals were consolidated for disposition with appeals filed earlier challenging the denial of preliminary injunctive relief in *Brunner* and *Sutton,* and the denial by the district court of class certification in the *Brunner* action.

The Court of Appeals for the Fourth Circuit affirmed the district court's opinion, finding: that "all of the material facts, save one, were established by uncontradicted evidence," and that as to that one issue—National's motivation in agreeing to sell the Division to Weirton Steel—the district court had

treated, and the Court of Appeals would treat, the fact as proved as petitioners had alleged, *Brunner* Appendix at A40; and that an employer who is also a plan fiduciary is not precluded from "exercising the right accorded other employers to renegotiate or amend, as the case may be, unfunded contingent benefits payable before normal retirement age." *Brunner* Appendix at A40-A42. The court further held that a contingent liability which was not required by ERISA to be funded did not constitute an "asset" of a plan for purposes of the "prohibited transaction" provisions of section 406 of ERISA and that National had not "caused the plan to engage in a transaction" by virtue of the segregation of plan assets into a separate trust for the benefit of Weirton Steel employees or retirees. *Brunner* Appendix at A42-A44. Finally, with respect to the unfair representation claim, the court affirmed the district court on the law and the facts and held that, in view of the procedural history of the actions, any irregularity which may have existed in the grant of summary judgment was harmless error. *Brunner* Appendix at A44-45.

## REASONS FOR DENYING THE WRIT

### I.

### THE RULING BY THE COURT BELOW THAT THE TERMS OF THE SALE OF THE DIVISION'S ASSETS TO WEIRTON STEEL DID NOT VIOLATE ERISA PRESENTS NO ISSUE WARRANTING REVIEW BY THIS COURT.

With respect to the ruling by the court below on petitioners' ERISA claims, petitioners offer essentially three purported justifications for granting of a writ of certiorari: (1) the court below decided questions of first impression which warrant review and further guidance by this Court, *Brunner* Petition at 9-11; (2) the decision by the court below will have far reaching impact on other benefit plans and plant closings, *Brunner* Petition at 10; and (3) the decision by the court below is erroneous, *Brunner* Petition at 11-20, *Sutton* Petition at 13-23.

Contrary to petitioners' assertions, the decision below properly applied established principles of law to a specific

factual setting and rejected a legal position which was unsupported, conflicted with both the language and intent of ERISA and which was patently unreasonable. The decision introduced no "new" interpretation of ERISA and thus is likely to have little, if any, impact on the administration of benefit plans governed by ERISA or on the integrity of benefit plans generally. Finally, the decision below arises in a unique factual setting which limits the precedential impact of the decision in areas where potential abuses may arise. Under these circumstances, review by this Court is unwarranted.

**A. The Decision By The Court Below That The Negotiated Terms Of A Sale Of Corporate Assets To An Employee-Owned Enterprise Are Not To Be Governed By The Fiduciary Standards Of ERISA Involved The Application Of Established Legal Principles And Requires No Review By This Court.**

The sole issue under section 404 of ERISA presented by petitioners is whether the court below erred in finding that amendments to employee benefit plans obtained by the employer through arms-length negotiations with representatives of its union and nonunion employees regarding the sale of corporate assets as an ongoing business to its employees are not to be measured against the fiduciary standards of section 404(a) of ERISA. 29 U.S.C. § 1104(a) (1982).

This issue was clearly resolved by this Court in *United Mine Workers Health & Retirement Funds v. Robinson,* 455 U.S. 562 (1982), which held that changes in pension benefits negotiated in the context of collective bargaining are not subject to scrutiny under the fiduciary standards imposed under section 302(c)(5) of the Labor Management Relations Act of 1947, 29 U.S.C. § 186(c)(5) (1982). That provision is, for practical purposes, identical to section 404(a)(1) of ERISA. *See NLRB v. Amax Coal Co.,* 453 U.S. 322, 332 (1981) (ERISA essentially codified the strict fiduciary standards that a section 302(c)(5) trustee must meet).

As petitioners urge here, the Court of Appeals held in *Robinson* that changes made in the eligibility rules for a benefit

trust which had been negotiated between the employer and the union were to be reviewed under the standards applicable to the review of actions of trustees in administering the fund, *i.e.*, the arbitrary and capricious standard. This Court reversed, holding that fiduciary standards were inapplicable to changes implemented as a result of collective bargaining when the plan itself allows the changes and no separate trust instrument prohibits the changes from being implemented.

As stated by this Court in *Robinson:*

> But when neither the collective bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the substantive terms of a collective bargaining contract.

455 U.S. at 576 (footnote omitted). The Courts of Appeals, following *Robinson,* have consistently adhered to this principle. *See Short v. United Mine Workers 1950 Pension Trust,* No. 83-1220 (D.C. Cir. Feb. 28, 1984), *reprinted in,* 100 Lab. Cas. (CCH) ¶ 10,844; *Sinai Hospital v. National Benefit Fund,* 697 F.2d 562 (4th Cir. 1982).

The rationale underlying these decisions is that when an employer is engaged in negotiations concerning the scope of a benefit plan, it is not engaged in discharging "duties with respect to a plan," but is acting as an employer whose business activities and objectives are not subject to ERISA's fiduciary standards. Although this dichotomy between action undertaken as an administrator and as an employer is perhaps most evident in the context of collective bargaining, it is no less applicable when an employer undertakes consideration of plan amendments affecting nonunion employees.

The employer continues to have the right to amend a benefit plan so as to limit nonvested contingent benefits, and such amendments no more merit the invocation of the fiduciary standards of ERISA than they do when they are negotiated in the course of collective bargaining. This is particularly true when, as in this case, the amendments arise out of direct arms-length negotiations with representatives of the nonunion em-

ployees which were coterminous with negotiations between the employer and the collective bargaining representative of the union employees. In short, whether an employer is an administrator of a plan covering union-represented employees or non-represented employees, it retains the right as an employer to determine the nature and amount of future benefits available under a plan, including amending the plan to limit or delete existing contingent and nonvested benefits.

*NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981), upon which petitioners principally rely, also illustrates the dichotomy between an employer acting as an "employer" and an employer "discharging duties with respect to a plan." In that case, this Court unequivocally distinguished between the "administration of trust funds" to which the fiduciary obligations of ERISA apply and the collective bargaining process, stating:

> The management-appointed and union-appointed trustees do not bargain with each other to set the terms of the employer-employee contract; they can neither require employer contributions not required by the original collectively bargained contract, nor compromise the claims of the union or the employer with regard to the latter's contributions. Rather, the trustees operate under a detailed written agreement, which is itself the product of bargaining between the representatives of the employees and those of the employer. Indeed, the trustees have an obligation to *enforce* the terms of the collective-bargaining agreement regarding employee fund contributions against the employer "for the sole benefit of the beneficiaries of the fund."

*Id.* at 336-37 (citations omitted) (emphasis in original).

Under settled precedent of this Court, therefore, an employer is not engaged in discharging duties with respect to a benefit plan when negotiating the terms of collective bargaining agreements, including modifications to the documents which brought the plan into existence. For this reason, the fiduciary obligations of section 404(a) do not apply to prevent an

employer from seeking concessions from its employees in the form of amendments to existing benefit plans which affect contingent and nonvested benefits.

The decision by the court below merely applied these settled principles to an analogous factual setting involving arms-length negotiations, both within and without the collective bargaining context, between an employer and its employees regarding the sale to the employees of corporate assets as an ongoing business. No novel question regarding the application of ERISA's fiduciary standards is before this Court, and the decision of the court below granting summary judgment in favor of respondents on petitioners' section 404(a)(1) claims does not warrant review by this Court.

**B. The Decision By The Court Below That No Prohibited Transaction Was Involved In The Sale Of The Division's Assets Merely Rejected An Unprecedented And Tortured Interpretation Of Section 406 Of ERISA And Does Not Merit Review By This Court.**

Petitioners' claims under section 406 of ERISA, 29 U.S.C. § 1106 (1982), likewise, present no issue worthy of review by this Court. Petitioners urged both courts below to place a strained judicial gloss upon the term "assets of the plan" in section 406, bringing within that section transactions which in no manner involve the use of monies or other property of the plan held for the purpose of providing benefits to plan participants. Petitioners failed to advance a single decision which even remotely supports such a gloss, or to explain how such a construction could be justified by the language or legislative history of the act.

The district court refused to give the term "asset" a meaning other than that given to it in the business community, *i.e.*, monies, property or other like assets. *Brunner* Appendix at A25-A26. The Court of Appeals affirmed, noting the incongruity between a rule, such as that urged by petitioners, which would render speculative contingent liabilities an "asset of the plan" and the fact that ERISA does not require such

contingent liabilities to be funded as assets of the plan. *Brunner* Appendix at A42-A43. The Court also noted that because no monies, property or other like assets were involved in the "elimination" of the contingent benefits at issue, no funds held by the plan for the purpose of paying benefits to participants were depleted or recouped by National as a result of the amendments to the terms of the plan. *Brunner* Appendix at A42.

This Court has long held that in interpreting statutory language, such language is to be given its usual or customary meaning absent compelling evidence that a different meaning was intended. *Aaron v. SEC,* 446 U.S. 680, 699-700 (1980); *Burns v. Alcala,* 420 U.S. 575, 580-81 (1975); *Banks v. Chicago Grain Trimmers Association,* 390 U.S. 459, 465 (1968); *Malat v. Riddell,* 383 U.S. 569, 571-72 (1966). Petitioners failed to produce such evidence either before the courts below or in their petitions to this Court. Furthermore, although Congress never explicitly defined the term "assets" in section 406, both the language and history of ERISA compel the conclusion that Congress intended the term to apply only to the monies and properties held by the plan for the payment of benefits.

As a threshold matter, the term "asset" in section 406 must be viewed in the light of the other terms within that section. *E.g., Third National Bank v. IMPAC Ltd.,* 432 U.S. 312, 322-23 (1977); *Jarecki v. G.D. Searle & Co.,* 367 U.S. 303, 307 (1961) (the maxim *noscitur a socii,* that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid giving unintended breadth to Acts of Congress). Section 406 deals quite plainly with the "sale or exchange, or leasing, of any property," the "lending of money" or the furnishing of "goods, services, or facilities" of a plan. 29 U.S.C. § 1106(a)(1) (1982). The use of these terms belies petitioners' contention that section 406 was intended to prohibit transactions other than those involving directly or indirectly the monies or property held in trust by the plan.

Petitioners' contention is refuted, as well, by the legislative history of ERISA. The House Conference Report accompanying ERISA states that one of the fundamental purposes of ERISA was to "establish new minimum funding requirements for plans of employers and unions ... so these plans will accumulate sufficient assets within a reasonable time to pay benefits to covered employees when they retire." H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess., *reprinted in,* 1974 U.S. Code Cong. & Ad. News 5038, 5064 (hereinafter cited as "Conference Report"). *Accord* H.R. Rep. No. 93-533, 93d Cong., 2d Sess., *reprinted in,* 1974 U.S. Code Cong. & Ad. News 4639, 4645 ("Funding" refers to the accumulation of sufficient assets in a pension plan to assure the availability of funds for payment of benefits due to the employees as such obligations arise)(hereinafter cited as "House Report"); S. Rep. No. 93-127, 93d Cong., 2d Sess., *reprinted in,* 1974 U.S. Code Cong. & Ad. News 4838, 4845-46 (hereinafter cited as "Senate Report"). Moreover, Congress expressly excluded from the fiduciary standards imposed by sections 404 and 406 various types of plans that are not required to be funded. Conference Report, *supra,* at 5076-77. Finally, the Conference Report clearly links the concept of "plan assets" to an employer's contributions when it states:

> Since the assets of the employee benefit plan are to be held for the exclusive benefit of participants and beneficiaries, plan assets generally are not to inure to the benefit of the employer. However, the conference substitute allows an employer's contributions to be returned to him in certain limited situations.

*Id.* at 5083.

The *Brunner* petitioners have quoted out of context a portion of the Conference Report to suggest that Congress intended section 406 to include transactions having nothing to do with the monies or properties of a plan. But, in context, even that portion of the Conference Report supports the view, adopted by the court below, that a prohibited transaction must,

as a threshold matter, involve the direct or indirect use of the monies or properties of a plan. That portion reads:

> The substitute prohibits the direct or indirect transfer of *any plan income or assets to or for the benefit of a party-in-interest.* It also prohibits the use of plan income or assets by or for the benefit of any party-in-interest. As in other situations, this prohibited transaction may occur even though there has not been a transfer of money or property between the plan and a party-in-interest. *For example, securities purchases or sales by a plan to manipulate the price of the security to the advantage of a party-in-interest constitutes a use* by or for the benefit of a party-in-interest *of any assets of the plan.*

*Id.* at 5089 *(emphasis added)*.

In view of the language of the statute and the foregoing statements of congressional intent, the rules of statutory construction established in cases such as *Aaron* and *Third National Bank* pose a nearly insurmountable obstacle to petitioners' argument that Congress intended the word "asset" to encompass anything other than monies, property or like assets. Those rules certainly required petitioners to come forward with more definitive evidence of *congressional* intent than vague statements of policy taken out of context and having no relevance to the definition of the term. *See Aaron v. SEC,* 446 U.S. at 700 n.19 (when language and legislative history provide adequate evidence of the meaning of a term, resort to considerations of "policy" is inappropriate when construing a statute). *Accord Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 214 n.33 (1976). Petitioners, however, failed to come forward with such evidence, thereby raising before this Court only a routine question of statutory construction utilizing standards established by this Court.

Furthermore, the question presented for review is not crucial to the administration of benefit plans under ERISA. Plans have been consistently administered under the assumption, endorsed by the courts below, that the term "assets of a

plan" is to be given its customary meaning, *i.e.*, monies, property or like assets. Indeed, FASB accounting practices provide that:

> Plan assets generally include cash, contributions receivable, investments measured at fair value, contracts with insurance companies (excluding those which obligate the insurance company to pay pension benefits) measured at contract value, and operating assets (such as buildings and equipment) measured at historical cost less accumulated depreciation.

FASB Statement No. 35 "Accounting and Reporting By Defined Benefit Pension Plans" 3 (1980) (hereinafter "Statement 35").

The Kass Affidavit[6] provides no support for petitioners' position. The court below held that, even if the Kass Affidavit were viewed as authoritative, there is a difference between defining the term "asset" for purposes of determining an employer's "pension expense," as did the Kass Affidavit, and defining the term "asset" for purposes of ERISA. The standards for determining pension expense are not controlling when determining a plan's "assets." *Brunner* Appendix at A42-A43. Statement 35 expressly endorses this position. Statement 35 at 2.

Petitioners have made no showing that plan trustees or administrators have departed from FASB standards in administering plans subject to ERISA. There is, therefore, simply no basis for assuming that the decision by the court below will alter significantly the manner in which ERISA has been interpreted or applied since its enactment nearly ten years ago. Under these circumstances, review of petitioners' claims under section 406 of ERISA by this Court is unwarranted.

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[6] The *Sutton* petitioners erroneously assert in their petition that Kass was a member of the actuarial firm retained by the Committee to analyze the various pension ramifications of the sale. *Sutton* Petition at 8. As stated in the Kass affidavit, Kass has been a member of the firm of Kass, Germain & Company since 1971. *Sutton* Appendix at 121a.

### C. The Decision Of The Court Below Arises In A Unique Factual Context And Is Not Likely To Have Widespread Implications For The Administration of Benefit Plans.

Review of the decision below by this Court is unwarranted for still another reason: the unique factual setting of this case. Petitioners' protestations notwithstanding, the facts which both courts below found to be conclusively established are that National made a *bona fide* economic decision to down-size the Division, and that the union—not the employer—initiated steps, including the formation of the Committee, to explore the possibility of an employee purchase of the Division in an effort to save its members' jobs. Every effort was taken to assure that the most equitable terms possible were obtained, including making provision for representation of nonunion employees on the Committee and retaining independent, outside experts of national and international repute to negotiate a framework for the sale and make recommendations to the ISU.

The negotiations culminated in a sale of assets as an ongoing business to an employee-owned corporation without a plant closure or even a pause in its activities. The terms of the sale were submitted to the union membership, including those members on layoff status, for ratification after full disclosure and were overwhelmingly approved. Under those terms, Weirton Steel employees were entitled to receive the identical benefits to which they were entitled as National employees, including shutdown benefits in the event Weirton Steel were to close.

Given these facts, it is respectfully submitted that this case is not appropriate for evaluating the proper relationship between the collective bargaining process and ERISA's fiduciary standards. This case does not present an occasion for this Court to reconsider its prior decisions in *Robinson* and *Amax Coal Co.*, nor does this case involve a deprivation of benefits without representation such as concerned the district court in *Calhoun v. Falstaff Brewing Corp.*, 478 F. Supp. 357 (E.D. Mo. 1979), *opinion after trial sub nom., Dependahl v. Falstaff Brewing*

*Corp.*, 491 F. Supp. 1188 (E.D. Mo. 1980), *modified on other grounds*, 653 F.2d 1208 (8th Cir.), *cert. denied*, 454 U.S. 968 (1981), a case which was decided before this Court's decision in *Robinson*. In addition, there is no suggestion that the opinion of the court below would necessarily extend beyond this case or outside the context of arms-length negotiations between an employer and representatives of both union and nonunion employees. This case, therefore, lacks an appropriate factual setting for the Court to reconsider earlier holdings or provide adequate guidance for future cases.

In summary, the decision by the court below that the sale of the Division's assets by National to its employees did not violate ERISA involved issues previously resolved by this Court and routine interpretation of statutory language, the meaning of which is clear on its face and from its legislative history. The resolution of those issues adopted by the court below, moreover, will not alter significantly the manner in which benefit plans are formulated or administered. Finally, this case presents a unique factual setting which renders it inappropriate as a vehicle to reconsider earlier decisions by this Court or to provide adequate guidance for use in other cases. For these reasons, as well as the fundamental soundness of the decision, the decision below respecting petitioners' ERISA claims does not warrant review by this Court.

## II.

## THE FINDINGS BY THE COURT BELOW THAT THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT TO THE ISU ON PETITIONERS' UNFAIR REPRESENTATION CLAIMS WAS HARMLESS ERROR SHOULD NOT BE REVIEWED BY THIS COURT.

With respect to the ISU, petitioners claimed below that the union breached its duty of fair representation to its members by "acquiescing" in the terms of the sale of the Division's assets when those terms would allegedly deprive ISU members of

certain pension and severance benefits. Both courts below found that the uncontroverted evidence failed to raise an issue of fact as to any impropriety on the part of the ISU. Specifically, the courts below found that: (1) the facts conclusively demonstrated that the terms of sale were not discriminatory, inasmuch as they uniformly applied to every member of the ISU; (2) that the transaction was largely formulated and recommended by independent, outside consultants having national and international reputations for excellence in their areas of expertise, whose recommendations were considered and adopted by the ISU; and (3) that petitioners had failed to offer any specific allegations or facts which would suggest that the ISU's actions with respect to the sale were arbitrary or in bad faith, despite having cross-examined at length the president of the ISU at a full evidentiary hearing.

Petitioners did not challenge these findings before the Court of Appeals, nor do they challenge them in their petition to this Court. Rather, as they did below, petitioners ask this Court to review alleged procedural irregularities in the granting of summary judgment in favor of the ISU. Petitioners' primary contention below, and in their petitions, is that they were denied notice and an opportunity to defend because the ISU did not make a formal motion for summary judgment.

The Court of Appeals, however, found that in view of the procedural history of this case any error committed was harmless. That history is recounted in detail earlier in this brief. In essence, summary judgment was granted to the ISU after petitioners presented live testimony from their own witnesses and cross-examined respondents' witnesses at length regarding all issues relevant to the unfair representation claims at a full evidentiary hearing on their motions for preliminary injunctions. Moreover, when the district court considered the motion to dismiss filed by the Committee and ISU, it deferred consideration of the unfair representation issues pending consideration of National's motion for summary judgment. Both National and petitioners filed statements of issues to be resolved on the summary judgment motion which included the

unfair representation claims. Thus, petitioners had both actual and constructive notice that the district court would resolve the unfair representation claims along with National's motion for summary judgment, in effect treating the deferred issues in the motion to dismiss as a motion for summary judgment.

Neither the court below, nor this Court, will reverse an otherwise valid decision on the grounds of procedural error when that error results in no prejudice to the party seeking reversal. *See* 28 U.S.C. § 2111 (1982); Fed. R. Civ. P. 61. It is evident from the history of this litigation that the substantive rights of petitioners herein were in no manner prejudiced by the district court's grant of summary judgment in favor of the ISU. Review of petitioners' unfair representation claims by this Court is therefore unwarranted.

## III.

## THE DECISION BELOW DISMISSING PETITIONERS' STATE LAW CLAIMS IS NEITHER SUBJECT TO, NOR MERITS, REVIEW BY THIS COURT.

The *Sutton* and *Dhayer* petitioners, on the last two pages of their petition, appear to challenge the decision of the district court not to exercise pendent jurisdiction over their state law claims. *Sutton* Petition at 24-25. The district court had declined to exercise pendent jurisdiction on the grounds that its pretrial dismissal of the federal law claims upon which pendent jurisdiction was allegedly predicated rendered the exercise of such jurisdiction inappropriate and not in the interest of judicial economy. *Sutton* Appendix at 79a-81a. That decision has not been properly brought before this Court, and, in any event, does not merit review by this Court.

### A. No Question Has Been Properly Presented To This Court For Resolution.

Rule 21.1(a) of the rules of practice of this Court provides that every petition for certiorari must contain a statement of the questions presented for review. Rule 21.1(a) then provides

that "only questions set forth in the petition or fairly included therein will be considered by the Court."

The *Sutton* petition presents only a single question for review: whether the court below properly granted summary judgment on petitioners' ERISA claims. *Sutton* Petition at i. The denial of pendent jurisdiction is nowhere set forth as a question for review nor is it fairly included therein.

Moreover, even if the briefing of an issue were deemed to comply with Rule 21.1, the *Sutton* petitioners have not raised any question for resolution by this Court. At best, petitioners merely set forth a basis upon which the district court could have exercised pendent jurisdiction at the outset of this litigation; they in no manner pose a concrete issue to be resolved by this Court. It is respectfully submitted, therefore, that no question regarding petitioners' pendent jurisdiction claims has been properly presented to this Court and, accordingly, the *Sutton* petition should not be granted.

**B. The Decision By The District Court To Decline To Exercise Pendent Jurisdiction Presents No Issue Worthy of Review.**

Petitioners apparently assert that the decision by the district court to decline to exercise pendent jurisdiction denied them "substantial procedural due process." *Sutton* Petition at 25. Such a patently frivolous position hardly merits consideration by this Court.

This Court has long held that the exercise of pendent jurisdiction is vested within the sound discretion of the court, which discretion should be exercised sparingly in the interests of judicial economy and with due consideration of the facts and circumstances of each case. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). Pendent jurisdiction is not a procedural right of petitioners, constitutional or otherwise.

Moreover, this Court ordinarily does not sit in review of fact-bound discretionary decisions of lower courts, especially when, as here, the legal standard is not in dispute. *E.g., Graver*

*Tank & Manufacturing Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949); *United States v. Johnston*, 268 U.S. 220, 227 (1925); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924). Petitioners have offered no basis for the Court to depart from that practice in this case. Indeed, neither before the court below, nor in their petition to this Court, have the *Sutton* petitioners advanced a single basis for finding that the district court abused its discretion. In view of the pretrial dismissal of petitioners' federal law claims, it is difficult to discern how such an argument could be made. Therefore, even if a question were properly before this Court, review would not be warranted.

## CONCLUSION

For all of the foregoing reasons, the Petitions for Writs of Certiorari in the *Brunner, Sutton* and *Dhayer* actions should be denied in their entirety.

Respectfully submitted,

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